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Statement of Atty. Gen.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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v.
THE UNITED STATES. } No. 195.

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ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## STATEMENT ON BEHALF OF THE UNITED STATES.

This statement is filed by leave of the court chiefly to show the irregularity of the petitioner's certificate, that question having been first emphasized at the oral argument.

The certificate, issued by the Chinese consul at New York, refers for its authority to section 6 of the act of 1882 as amended by the act of 1884, to Article II of the treaty of 1880, and to a Treasury circular dated August 1, 1891 (Tr. Dec. 11606). Section 4 of the act of 1882 as amended provided for a return or identification certificate to be furnished to certain Chinese laborers departing from the United States, by the collector of customs or his deputy, which entitled such laborers to return

to this country upon producing that certificate. All rights of laborers under that section were taken away by the act of October 1, 1888. Section 6 of the act of 1882 as amended prescribed a certificate for every Chinese person other than a laborer who may be entitled to come within the United States and "who shall be about to come to the United States," which evidenced, among other matters, the permission of and identification by the Chinese Government of the applicant as so entitled, and made this certificate the sole evidence permissible on the part of the person producing the same to establish his right of entry into the United States. Section 12 of that act, as amended, required the certificate prescribed to be produced by Chinese persons entering the United States by land as well as by those landing from a vessel. The certificate was declared to be the only *prima facie* evidence of the facts set forth. There was no specific provision in those acts for any certificate to show the right to leave this country and return, or for the identification of Chinese persons, other then laborers, who were entitled to come within the United States. (*Lau Ow Bew* v. *United States*, 144 U. S., 47, 63.) Accordingly, it was required, in the administration of the laws up to March, 1892, that all Chinese persons other than laborers, whether entering the country for the first time or returning after a temporary absence, should produce the certificate prescribed by section 6 of the act of 1884, and the Treasury circular referred to *supra* quoted the full text of the decision in the case of *Wan Shing* v. *United States* (140 U. S., 424) as the authority for this view.

By the Lau Ow Bew decision, which was rendered March 14, 1892, it was held that it was incongruous and unreasonable to exact of a Chinese merchant duly domiciled in this country and returning thereto the certificate of the act of 1884, and (in effect) that other proofs of identity might be sufficient. By Treasury decision 11,291 certificates of Chinese consuls in countries foreign to China (apparently, however, other than the United States) were recognized, but this concession was considered to have been revoked by the Treasury circular of August 1, 1891. By the opinion of Attorney-General Olney (20 Op., 693), it was held that a certificate under the act of 1884 might be issued by a Chinese consul in a foreign land as the certificate of the Chinese Government, which had the right to select the consul as its agent for this purpose. By the opinion of Attorney-General Harmon (21 Op., 481) it was held that the consul's authority to act for the Chinese Government was not to be presumed; and by later opinions and rulings it is now held by the Departments (Treasury Dig., Chinese Laws and Decisions, *ut infra*) that the certificate of a Chinese consul in this country or any other country foreign to China is not a valid certificate under the act of 1884. Some of the rulings related to Chinamen of the exempt classes who were coming to this country for the first time (see also *United States* v. *Mock Chew*, 54 Fed. Rep., 490); it does not appear clearly, from an examination as thorough as possible within the time allowed for filing this statement, whether any of the rulings apply to such Chinamen returning.

It will be perceived that the Executive rulings are somewhat conflicting (Dig. "Chinese Exclusion" Laws and Decisions, Treasury Department, 1899, pp. 28, 29); but paragraph 34 of the Chinese Regulations of 1896, page 10, declares that certificates of Chinese consuls are not recognized unless the authority of their Government therefor is shown, and paragraphs 10 and 11, page 33, of the Regulations of 1899 are to the same effect. All of these were regulations duly promulgated and are controlling.

The Lau Ow Bew case pointed out the unreasonableness and absurdity of the view that the Chinese Government should certify to facts respecting an applicant's domicile and business in this country, which were more properly in the cognizance of this Government. In other words, it held that the phrase in section 6 of the act of 1884 "and who shall be about to come to the United States" referred to those Chinese persons who were coming here for the first time, and not to those returning. The United States now submits, on a similar view, that in reference to a merchant departing from this country and desiring to return, it was the permission of and identification by this Government, rather than by the agent here of the Chinese Government, which was necessary or appropriate to show such applicant's right to go and come of his own free will and accord. Therefore the petitioner's certificate is incongruous as well as irregular under the rulings, and as it relies for authority on those certificate provisions of the act of 1884 which are applicable only to those coming here for the first time, it can not be held to furnish the petitioner

with a charter establishing his status and showing his right either to remain in this country or to depart and return thereto. At best, if there were no such objections to it as are now pointed out, it would, by the very terms of the law on which it is founded, make but a *prima facie* case.

It may also be suggested that the act of May 5, 1892, which became a law more than a year before the petitioner left this country in 1893, gave Chinese persons other than laborers, having a right to be and remain in the United States, a proper certificate of residence or identification as evidence of such right, which the petitioner, if he were entitled thereto, might have obtained. This, rather than the certificate which he took out with him to China and produced on his return, was the regular certificate for his case; although, while it might have been conclusive in essence (if it were genuine and the applicant's identity were established), he would still probably have been required, under the act of 1893, to establish his former status here as a merchant by the testimony of two credible witnesses other than Chinese. There seems to be no law or regulation requiring such testimony to be oral. But under the certificate actually produced we contend that he was necessarily required to furnish such testimony at the frontier. Although the act of 1893 was passed after he left this country, the decision in the *Chinese Exclusion Case* shows that that fact makes no difference; and if there is any presumption that he did produce to the collector at the frontier the testimony of two credible witnesses other than Chinese, to give such presumption

conclusive effect would be to deny the right of the Government to disprove the facts stated in his certificate, and the right to require of him affirmative proof to the satisfaction of the commissioner, which rights on the part of the Government were originally recognized in section 6 of the act of 1884 and preserved by the act of August 18, 1894, as to controverting the certificate, and were made clear by section 3 of the act of 1892 as to the burden of proof. The constitutionality of these very provisions or of similar provisions has been fully sustained by the court.

In reference to opposing counsel's remarks concerning the Government brief, there was no impropriety or unfairness in the discussion of the Ping Yik and Pin Kwan cases. The facts in those cases sufficiently appear in the opinions of the circuit court of appeals given in the appendix to the Government brief. The cases were brought to the court's attention in order to show how the claim that an employee in a merchant firm is himself a merchant was disposed of after careful argument by a circuit court of appeals. The cases are as yet unreported. The court was merely informed by the Government brief of the facts and the decisions. There was no intention or effort to prejudice those cases, to impose upon the present case the record in those cases, nor to mislead this court regarding them. The court was expressly advised that they were likely to be brought here for review. Further, being discussed in the Government brief for the information of the court and to show how the underlying question arises, all of the references to those cases might

have been omitted from the brief without affecting in the least the argument made respecting the underlying question as applied to the present case. That question is fairly presented by this record. It starts from the concession of the Government, for the sake of argument, that Li Sing, even if not a laborer at all, and even if connected, as he alleges, with a merchant firm, was not included in any one of the classes of Chinese persons other than laborers who alone are entitled to enter this country. The argument of the Government plainly indicated that the determination of this question was not necessary to the determination of Li Sing's case, and the Government stood upon the facts proved showing him to be a laborer, and upon the commissioner's right to deport.

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